IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife,
FRANCES HAWKINS SPENCE, and
RONALD KENNETH SPENCE,
Petitioners,

v.

SUSAN DURHAM SPENCE,
JAMES ROBERT DURHAM and wife,
FAYE MUNDY DURHAM,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR RESPONDENTS, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM, IN OPPOSITION

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BRIEF FOR RESPONDENTS, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM, IN OPPOSITION

These Respondents, James Robert Durham and wife, Faye Mundy Durham, file this separate brief opposing the Petition for Certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 283 N. C. 671, 198 S. E. 2d 537 (August 31, 1973); the opinion of the Court of Appeals of North Carolina is reported at 16 N. C. App. 372, 191 S. E. 2d 903 (October 25, 1972); the opinion of the Supreme Court of Georgia is reported at 228 Ga. 529, 186 S. E. 2d 723 (January 6, 1972, rehearing denied February 11, 1972). The judgments and orders of the Forsyth County, North Carolina District Court and the Cobb County, Georgia Superior Court are not reported.

The Petition for Certiorari was filed December 10, 1973, but was not received by counsel for the Respondents, James Robert Durham and wife, Faye Mundy Durham, until December 13, 1973.

QUESTIONS PRESENTED

1. Is there a federal question properly presented to this Court by the Petition for Certiorari?

2. May the Courts of North Carolina, without violating the Full Faith and Credit Clause, Article IV, §1 of the Constitution of the United States, enter a decree changing custody of minor daughters from that of their grandparents, as provided in a Georgia decree entered more than two years earlier, to the custody of their mother, based on a change of circumstances when the minor children are physically present in North Carolina and in the custody of grandparents in North Carolina and when all parties concerned are within the jurisdiction of North Carolina?

STATEMENT OF FACTS

These Respondents agree generally with the statement of facts appearing in the Petition for Certiorari except that:

1. There is no evidence that the Respondent, Susan Durham Spence, moved to North Carolina for the express purpose of relitigating the custody of the children as stated on page 6 of the Petition for Certiorari. These Respondents have no reason to believe that this is true.

2. It is not correct that there was no evidence before the North Carolina Court showing changes of circumstances as stated on page 7 of the Petition for Certiorari.

3. These Respondents do not believe that the modification made by the Supreme Court of North Carolina in the decree of the Forsyth County District Court indicated any doubt on the part of the Supreme Court of North Carolina in its opinion and judgment, as stated on page 8 of the Petition for Certiorari.

JURISDICTION

There is no doubt that this court has jurisdiction to review by writ of certiorari a decree of the Supreme Court of North Carolina if the validity of that decree is drawn in question on the ground that it is repugnant to the Constitution of the United States. 28 USC §1257.

The Petitioners assert that the decree of the Supreme Court of North Carolina is repugnant to the Full Faith and Credit Clause of the Constitution of the United States, Article IV, §1.

The real question is whether a child custody decree entered by the courts of one state is such a decree requiring full faith and credit by the courts of a sister state.

For any decree of the courts of one state to be protected by the Full Faith and Credit Clause, the question must be raised in the highest court of the state.

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented *to the highest court of the State* having jurisdiction and that its decision of the federal question was necessary to its determination of the cause." *Durley v. Mayo*, 351 U.S. 277, 100 L. ed. 1178 at 1183 (1955), rehearing den. 352 U.S. 859, 1 L. ed. 2d 69 (1956). (Italics supplied)

In the Supreme Court of North Carolina, the present Petitioners (among the defendants in the North Carolina courts) expressly conceded that the North Carolina trial court had authority to change the Georgia custody decree upon a showing of changed circumstances.

> "Spence [the father] and the paternal grandparents, appellees in this court, conceded that the District Court of Forsyth County had authority to change the Georgia custody decree upon a showing of changed circumstance." (Opinion of the Supreme Court of North Carolina, Petitioners' Appendix, pp. 35a-36a)

This left no *federal question* before the Supreme Court of North Carolina. The only questions left before the Supreme Court of North Carolina, aside from questions relating to the admission and exclusion of evidence and the like, were whether there had been a change of circumstances and whether those changed circumstances supported the custody decree rendered by the North Carolina trial court. These are not federal questions.

These Respondents question whether *any* child custody decree, because of its ephemeral nature, depending for its continued validity upon the welfare of the child at any particular time, is such a decree as is protected by the Full Faith and Credit Clause of the Constitution of the United States. This question has been expressly reserved by this court in *New York ex. rel. Halvey v. Halvey,* 330 U.S. 610, 91 L. ed. 1133 at 1136 (1947); *Kovacs v. Brewer,* 356 U.S. 604, 2 L. ed. 2d 1008 (1958); *Ford v. Ford,* 371 U.S. 187, 9 L. ed. 2d 240 (1962).

In any event, the Petitioners have not complied with the requirements of Rule 23-1(f) requiring that if review of the judgment of a state court is sought, "the statement of the case shall also specify the stage in the proceedings in the court of first instance *and in the appellate court,* at which, and the manner in which, the federal questions sought to be reviewed were raised; ° ° ° with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Italics supplied.)

The careful attorney for the Petitioners has failed to do this but has merely stated, "The full faith and credit issue was raised by the petitioners in their pleadings, and was reiterated at trial and before both appellate courts." (Petition for Certiorari, p. 8) The failure of the petition for certiorari to comply with Rule 23-1(f) in this respect was probably not an oversight. Compliance with the rule could not have demonstrated that a federal question was presented in the Supreme Court of North Carolina.

Decree Sought to be Reviewed

The decree sought to be reviewed was entered by the District Court of Forsyth County, North Carolina, on June 2, 1969. It was affirmed (with a modification not material here) by the Supreme Court of North Carolina on August 31, 1973.

Rehearing

No effort was made by the Petitioners to obtain a rehearing in the Supreme Court of North Carolina.

Statutory Provision

The statutory provision relied upon by the Petitioners and believed by them to confer on this Court jurisdiction to review the judgment of the Supreme Court of North Carolina is 28 USC §1257. These Respondents contend that neither this provision of the United States Code nor any other provision confers on this Court jurisdiction to review the judgment of the Supreme Court of North Carolina under the circumstances of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Statute

28 USC §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the

ground of its being repugnant to the Constitution, . . . or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, . . ." June 25, 1948, c. 646, 62 Stat. 929

United States Constitution

Article IV, §1:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. . . ."

North Carolina Statutes

General Statute 50-13.5(c) (2):

"The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

"a. The minor child resides, has his domicile, or is physically present in this State, or

"b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control and custody of the minor child."

General Statute 50-13.7:

"*Modification of order for child support or custody.* —

. . . . . .

("b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for sup-

port or custody which modifies or supersedes such order for custody or support."

ARGUMENT

Summary of Argument

The Full Faith and Credit Clause of the Constitution of the United States does not prevent the state of the forum (North Carolina) from changing a child custody decree if the law of the state where it was rendered (Georgia) permits a change under similar circumstances. The law of Georgia permits a child custody decree rendered by its own courts to be changed if the circumstances change. The North Carolina Court, after a full and complete hearing, and with jurisdiction over the identical parties involved in the Georgia decree and with the children physically within North Carolina, determined that there had been a change of circumstances since the Georgia decree. Therefore, the judgment of the North Carolina Court, sustained by the highest court of North Carolina, is a valid judgment.

Body of Argument

1. This Court has specifically held that if the court of one state is empowered to alter its own child custody decree upon a showing of changed circumstances, the courts of another state may modify the decree upon the same grounds.

In *New York ex. rel. Halvey v. Halvey,* 330 U. S. 610, 91 L. ed. 1133 at p. 1136 of L. ed. (1947), this Court said:

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article 4, §1 of the Constitution provides that 'Full Faith and Credit

> shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' * * *
>
> "The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. (citing cases) But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. * * * Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (citing case), *it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.*" (Italics supplied.)

The same question was before this Court in *Kovacs v. Brewer*, 356 U. S. 604, 2 L. ed. 1008 (1958), where this Court (quoting in part from *New York ex rel. Halvey v. Halvey, supra*), said at page 1012 of Lawyers Edition:

> "Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in *Halvey* 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it is rendered.'"

Still later, the same question came before this Court in *Ford v. Ford*, 371 U. S. 187, 9 L. ed. 2d 240 (1962), where the Court said at page 244 of Lawyers Edition:

> "The Full Faith and Credit Clause, if applicable to a custody decree, would require South Carolina to recognize the Virginia order as binding *only if a Virginia court would be bound by it.*" (Italics supplied.)

This Court has reserved the question of whether a child custody decree, even without a change of circumstances, is required to be given full faith and credit in the courts of a sister state. *New York ex rel. Halvey v. Halvey, supra; Kovacs v. Brewer, supra; Ford v. Ford, supra.*

2. It is the law of Georgia that a child custody decree determines only the *present* rights of the parties under the circumstances then existing and is subject to judicial change upon a change of circumstances affecting the welfare of the child. In *Holmes v. Holmes,* 211 Ga. 827, 89 S. E. 2d 194 (1955), the Supreme Court of Georgia said at page 195 of the Southeastern Reporter:

> "A decree of divorce in which the custody of a child or children is awarded to one of the parents is conclusive as between the parties to the decree as to the right of that parent to the custody of the child or children, *unless a change of circumstances materially affecting the interest and welfare of the child or children is shown to have arisen since the date of the decree.*"

Twelve Georgia cases are cited following the above quotation.

While it is not necessary to this line of reasoning, the law of North Carolina is to the same effect. *Shepherd v. Shepherd,* 273 N. C. 71, 159 S. E. 2d 357 (1968); *Wilson v. Wilson,* 269 N. C. 676, 153 S. E. 2d 349 (1967); *Spence v.*

Durham (the present case), 283 N. C. 671, 198 S. E. 2d 537 (1973).*

In both North Carolina and Georgia, the rule is that the welfare of the child whose custody is in controversy is "the polar star by which the courts must be guided in awarding custody." Mr. Justice Black, in *Ford v. Ford, supra,* referred at page 244 of the Lawyers Edition to the requirement that the child's interest must be put first as probably the law of every State of the Union.

The position taken by the Petitioners in the trial court in North Carolina conceded that the North Carolina court had the power to change the Georgia custody decree if there had been a change of circumstances.

> "Spence and the paternal grandparents, appellees in this court, concede that the District Court of Forsyth had authority to change the Georgia custody decree upon a showing of changed circumstances. However, they contend '(1) The plaintiff failed to show a change of circumstances because she did not offer any proof of what the circumstances were at the time the Georgia order was entered * * * (2) The facts cited as justification for her having custody are irrelevant, insubstantial, and feathery. * * *" (From the opinion of the Supreme Court of North Carolina, Petitioner's Appendix, pp. 35a-36a.)

The Supreme Court of North Carolina disposed of this contention as follows:

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*The opinion of the Supreme Court of North Carolina in the present case is copied beginning at page 18a of the Appendix to the Petition for Writ of Certiorari. See page 34a of the Appendix where the Court cites numerous cases both from North Carolina and Georgia in support of this proposition.

"Since the greater part of the testimony covering 359 pages of the record was aimed at establishing the situation which existed at the time the Georgia decree was entered, there is no merit in appellees' first contention." (From the opinion of the Supreme Court of North Carolina, Petitioners' Appendix, p. 36a.)

3. There had been a change of circumstances. The Georgia Court heard no evidence and made no findings of fact before entering its decree. Therefore, it was necessary for the North Carolina trial court to take evidence as to the conditions existing at the time of and leading up to the Georgia decree. That there had been a change of circumstances since the Georgia decree was rendered is shown by the following:

(a) The Georgia decree was entered June 2, 1969. The judgment of the North Carolina trial court was rendered September 29, 1971, more than two years thereafter. There was ample *time* for a change of circumstances to occur.

(b) The Petitioner Ronald Kenneth Spence (father of the children) and the Respondent Susan Durham Spence (mother of the children) were both consulting psychiatrists during a period shortly before the entry of the Georgia decree and when the condition in their home was, in the language of the Supreme Court of North Carolina, "beyond the pale of the most permissive society." (Petitioners' Appendix, p. 25a)

(c) The Petitioner Ronald Kenneth Spence (father of the children) expressed the opinion that his wife "was disqualified as a custodian only because she was not sufficiently stable over a sufficiently long period of time to guarantee the children 'a consistent environment.'" (Peti-

tioners' Appendix, p. 26a) The children have been in the sole custody of their mother in Winston-Salem, North Carolina, since July 20, 1971, and for the period between September, 1970, and July 20, 1971, the children were in Winston-Salem in the custody of their maternal grandparents under the Georgia decree subject to visitation rights by the mother. There was a period, therefore, of approximately a year in which the North Carolina trial court was able to take direct testimony as to the stability of the mother. (Petitioners' Appendix, pp. 24a-25a)

(d) The Petitioners insist that the mother, Susan Durham Spence, was unfiit to have custody of the children because she was a homosexual and that this fact was known to the Georgia Court at the time it entered its decree. Two doctors testified for the mother in the North Carolina trial court. One, Dr. Richard C. Proctor, head of the Department of Psychiatry at the Bowman Gray School of Medicine, testified that he had examined the mother in March, 1971, and that he could find no indication of abnormal tendencies and that, in his opinion, she would be a competent and capable mother able to assume the responsibility of rearing her children in a satisfactory manner and that one could readily have such a disorder in 1968 without its being present in 1971. (Petitioners' Appendix, p. 29a)

The other, Dr. David Allen Hill, a clinical psychologist on the faculty of Wake Forest University, examined the mother for the purpose of testifying, and cautioned her before the examination that his tests might reflect unfavorably upon her. After administering a series of eight tests, Dr. Hill concluded that she was "in the ordinary sense of the word a normal individual," showing "normal female interests in work and hobby and relating to people," and that she enjoyed working with children. He found no evidence of a personality pattern consistent with sexual devi-

ancy, prolonged promiscuity, or peculiar behavior. He was of the opinion that in submitting herself to these tests, she attempted to present herself in "as positive and as honest a light as she could." (Petitioners' Appendix, p. 28a)

(e) The mother is a clinical speech pathologist certified by the American Speech and Hearing Association. (Petitioners' Appendix, p. 27a)

(f) She is head of the Speech Pathology Department at the Medicenter's Winston-Salem facility where she gives therapy of all types to patients with speech afflictions and conducts an out-patient clinic in which she gives speech therapy to both children and adults in the entire Forsyth County (Winston-Salem's county) area, and sees patients from the nearby cities of Greensboro, Salisbury, High Point, Statesville and Lexington and that 45% of her patients are children. (Petitioners' Appendix, p. 27a)

(g) The mother is now residing in an appropriate home on Country Club Road directly across the street from the children's school in the Trinity Methodist Church. She walks the children across the street to school before going to work in the mornings and returns to pick them up at 3:00 in the afternoon. (Petitioners' Appendix, p. 28a)

(h) The mother is herself an active member of the Trinity Methodist Church, sings in its choir, and participates in church functions. (Petitioners' Appendix, p. 28a)

(i) The children sing in the children's choir of the Trinity Methodist Church and do superior work in the private school housed in the Trinity Methodist Church. (Petitioners' Appendix, p. 28a)

(j) The Plaintiff offered evidence that her good character and reputation in the community were good. The pastor of her church testified that he had known the mother

since June, 1970, and had observed her with the children and that they had a happy and normal relationship and the children seemed well adjusted. (Petitioners' Appendix, p. 29a)

(k) The Petitioner, Ronald Kenneth Spence, had employed detectives to observe the plaintiff to find out what her circumstances were and to discover whether she was engaged in any abnormal conduct. It is significant that these detectives were not called in the North Carolina trial as witnesses against the mother. (Petitioners' Appendix, p. 29a)

(l) The children's maternal grandparents, Respondents James Robert Durham and his wife, Faye Mundy Durham, from whose custody the children were taken by the decree of the North Carolina Court, supported the contention of their daughter, who was the mother of the children, that she should have their custody.* (Petitioners' Appendix, pp. 26a-27a)

There was ample evidence, therefore, as the Supreme Court of North Carolina concluded, to support the findings of fact made by the North Carolina trial court (briefly summarized above) and its conclusion that the mother "is now a fit and proper person to have custody of her children" and that "the conditions surrounding the parties have changed so substantially that the best interests of the children require the judgment [the Georgia judgment] be

*Although supporting the mother's action to obtain custody of the children, the maternal grandparents had no advance knowledge of the mother's suit to obtain custody. The North Carolina suit did not begin as a collusive proceeding between the Respondent, Susan Durham Spence (plaintiff in the North Carolina suit) and her parents (Respondents James Robert Durham and wife, Faye Mundy Durham), among the defendants in the North Carolina suit. (Petitioners' Appendix, p. 24a)

altered by awarding their custody to their mother." (Petitioners' Appendix, pp. 31a-32a)

The Court should note that the Supreme Court of North Carolina recognized that the mother's continued fitness as custodian of her children should be monitored and, while generally affirming the judgment of the trial court awarding custody to the mother, it directed the District Court of Forsyth County at least every six months to obtain from the appropriate social service department of the county a report made after due investigation as to the children's condition, surroundings and progress and as to their mother's status and condition and the manner in which she is caring for her children and that a copy of such report be furnished to all parties to the proceeding – that is to say, the father of the children, the maternal grandparents, and the paternal grandparents.

North Carolina Procedure

North Carolina General Statutes §50-13.5(c)(2) gives to the North Carolina courts jurisdiction to enter child custoday decrees when the child is physically present in the state or when the North Carolina court has personal jurisdiction of the person having custody of the child.

North Carolina General Statutes §50-13.7 expressly authorizes the courts of North Carolina, upon gaining jurisdiction [under General Statutes §50-13.5(c)(2)] and upon a showing of changed circumstances, to change child custoday decrees rendered by a court of another state.

The parties before this Court, Petitioners and Respondents, are the identical parties who were before the courts in Georgia and in North Carolina. The children were physically in Georgia at the time the Georgia decree was entered as were their custodians, and the children were physi-

cally present in North Carolina (and had been for about a year) when the North Carolina decree was entered, as were their custodians. There is no question, therefore, but that, so far as North Carolina procedure was concerned, the North Carolina case was properly constituted and properly before the North Carolina courts. All parties were represented by counsel in both the Georgia proceedings and in the North Carolina proceedings, and in the North Carolina proceedings, all parties were present at the trial and actively participated in the trial except the maternal grandfather, James Robert Durham, who was ill at the time of the trial.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Jul 1974

MANUEL RODAK, JR., CLERK

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---

BRIEF FOR RESPONDENT, SUSAN DURHAM SPENCE, IN OPPOSITION

JURISDICTION

The respondents respectfully contend that the petitioners have not demonstrated sufficient facts to invoke the jurisdiction of this Court. The final order and judgment in the case was rendered in the Forsyth County,

North Carolina District Court on the 11th day of January, 1972. The petitioners herein filed an appeal to the North Carolina Court of Appeals, which reversed the judgment of the Forsyth County District Court on October 25, 1972. On November 16, 1972, the respondent, Susan Durham Spence, filed notice of appeal to the Supreme Court of North Carolina on the grounds that a substantial constitutional question was involved in the case. In the alternative, the respondent filed a petition for certiorari to review the decision of the North Carolina Court of Appeals. On November 24, 1972, the petitioners, Ronald Kenneth Spence, Richard T. Spence, and Frances Hawkins Spence, filed a motion in the Supreme Court of North Carolina to dismiss the appeal of Susan Durham Spence on the grounds that the case did not involve a substantial constitutional question. The Supreme Court of North Carolina thereafter granted Certiorari and on the 31st day of August, 1973, reversed the decision of the Court of Appeals, thereby reinstating and affirming the judgment of the Forsyth County, North Carolina District Court.

QUESTION PRESENTED

In a child custody proceeding, wherein both North Carolina and Georgia permit modification of a prior custody decree upon a showing of a substantial change in circumstances, and the North Carolina trial Court found a substantial change in circumstances since the entry of the 1969 Georgia decree, which ruling was affirmed by the North Carolina Supreme Court on certiorari to the North Carolina Court of Appeals, may the party who moved to dismiss an appeal as of right to the North Carolina Supreme Court for lack of a constitutional issue, thereafter invoke the jurisdiction of the United States Supreme

Court to review the North Carolina proceedings, by asserting that the North Carolina courts unconstitutionally refused to give the Georgia decree full faith and credit?

CONSTITUTIONAL PROVISIONS

The respondent, Susan Durham Spence, respectfully contends that no constitutional questions are involved in view of the finding of change in circumstances, and that the petitions have not demonstrated sufficient facts to invoke the jurisdiction of this Court.

STATEMENT OF CASE

Susan Durham Spence instituted a civil action in the District Court of Forsyth County, North Carolina, for the custody of her two minor children, Fay Frances Spence (age 8) and Dianna Jeannene Spence (age 6). In June of 1969, she and her husband, Ronald K. Spence, had entered into a "consent agreement", which was filed in the Superior Court of Cobb County, Georgia, under threat that unless the agreement was signed, Mrs. Spence would be denied the right to see the children. No witnesses were called in the Georgia proceeding, which awarded custody to the paternal grandparents during the summer and the maternal grandparents during the remainder of the year. The father, Ronald K. Spence, was relieved of any obligation to support the children. Subsequent to the parties' divorce, Mr. Spence remarried and Mrs. Spence moved to Winston-Salem, North Carolina.

Following several continuances at the request of Ronald Spence, the North Carolina custody action came on for hearing in the Forsyth County District Court before

the Honorable John C. Clifford. After four full days of hearings, Judge Clifford entered an order in which he found, *inter alia*, that substantial changes in circumstances had occurred so as to warrant modification of the Georgia order. The changed conditions found as facts by Judge Clifford may be summarized as follows:

> "1. The defendant Spence stated in open Court that it is their contention that at the time of the entry of the document in Cobb County on June 2, 1969, that Susan Durham Spence was not a fit and proper person to have custody of Fay and Dianna. If that be the case and the justification for the entry of the June 2, 1969, instrument, then that condition has substantially changed in that Susan Durham Spence is now a fit and proper person to have the custody of her children.
>
> 2. At the time of the entry of the June 2, 1969, document, Susan Durham Spence was highly emotional as well she should have been since her children were taken from her without her knowledge or consent on January 9, 1969, and since that date she had never been allowed to have her children in her care and custody alone. Today Susan Durham Spence is a well-adjusted emotionally stable individual fully capable of caring for and rearing Fay and Dianna.
>
> 3. Fay and Dianna are now older and at an age when they need the care, love and attention of their mother. On June 2, 1969, this was not as crucial to their well-being as it is today.

4. The grandparents Spence and Durham are not as able to respond to the daily needs of these two small girls as they were on June 2, 1969; J.R. Durham is in ill health at the present time; and, the burden of the financial support and care and custody of Fay and Dianna should not now be imposed on the grandparents.

5. Ronald Kenneth Spence has, since the entry of the June 2, 1969, document, become the father of an illegitimate child, remarried, become the father of a legitimate child and moved to the State of Kansas where he is unemployed, has no income from any source, and is living off the accounts receivable of his present wife, who is also unemployed.

6. Fay and Dianna have been in the sole and exclusive custody of their mother since July of 1971, a period of five (5) months.

7. Susan Durham Spence now has an established profession and home in this community where she is more than able to adequately care for the needs of the two children. Her routine and schedule of work here is such that she can be with the children almost all times when they are not actually in school.

The petitioners appealed the Order of Judge Clifford to the North Carolina Court of Appeals, which held that the trial court correctly concluded that, even if the Georgia decree was entitled to full faith and credit, the North Carolina courts had jurisdiction to modify the prior order when the children were physically present in the State and a showing of changed circumstances is made. Nevertheless,

the North Carolina Court of Appeals held that the evidence did not support the findings and that the findings did not support the judgment, and thus, reversed the trial court.

On November 16, 1972, Susan Durham Spence, gave Notice of Appeal to the North Carolina Supreme Court, pursuant to the provisions of G.S. 7A-30, which provides in pertinent part that a party may appeal a decision of the Court of Appeals as a matter of right when the decision directly involves a substantial question arising under the Constitution of the United States or North Carolina.

On November 24, 1972, the petitioners filed a motion in the North Carolina Supreme Court, entitled "MOTION TO DISMISS APPEAL FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION." In that motion, the petitioners contended that "this case does not involve a substantial constitutional question. . . ." Mrs. Spence had also filed a Petition for Writ of Certiorari in the North Carolina Supreme Court to review the decision of the North Carolina Court of Appeals, on grounds that the case involved legal principles of major significance to the jurisprudence of North Carolina and had significant public interest so as to warrant discretionary review.

By order dated January 2, 1973, the North Carolina Supreme Court issued a Writ of Certiorari to the North Carolina Court of Appeals to review its decision. On January 2, 1973, the Supreme Court of North Carolina ruled that the motion to dismiss Mrs. Spence's purported appeal for lack of a substantial constitutional issue was rendered moot by the issuance of a Writ of Certiorari to the Court of Appeals.

In reversing the Court of Appeals and affirming the ruling of the trial Court awarding custody to Mrs. Spence,

the Supreme Court stated that North Carolina courts "will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged." The North Carolina Supreme Court held that the evidence fully supported the findings and judgment, and noted that in view of the changed circumstances, it was not necessary to consider the question of full faith and credit.

From the adverse decision of the North Carolina Supreme Court, the petitioners seek a Writ of Certiorari from this Court on the grounds that this case involves substantial constitutional issues.

ARGUMENT

THE NORTH CAROLINA COURTS DID NOT DENY THE GEORGIA DECREE FULL FAITH AND CREDIT, AND THE PETITIONERS SHOULD NOT BE PERMITTED TO INVOKE THE CONSTITUTIONAL JURISDICTION OF THIS COURT AFTER PREVIOUSLY ASSERTING THAT THIS CASE INVOLVED NO SUBSTANTIAL CONSTITUTIONAL ISSUES, IN LIGHT OF THE FINDING OF CHANGED CIRCUMSTANCES.

As noted by Justice Sharp in the opinion of the North Carolina Supreme Court in this case (Petitioners' Appendix, p. 34a):

> "In both Georgia and North Carolina, a decree awarding the custody of minor children determines only the present rights of the parties under the conditions then existing; it is not permanent in its nature and is subject to judicial alteration or modification upon any

> change of circumstances substantially affecting the welfare of the children. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E.2d 357 (1968); *Wilson v. Wilson*, 269 N.C. 676, 153 S.E.2d 349 (1967); *Thomas v. Thomas*, 259 N.C. 461. 130 S.E.2d 871 (1963); *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949); *Holmes v. Holmes*, 211 Ga. 827, 89 S.E.2d 194 (1955), *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943). The rule is that the welfare of the child whose custody is in controversey is 'the polar star by which the courts must be guided in awarding custody.' "

In *In Re Craigo*, 266 N.C. 92, 145 S.E.2d 376 (1965), the North Carolina Supreme Court observed:

> "The constitutional provisions Articles IV, Sec. 1, requiring full faith and credit to be given to judicial proceedings in sister states did not require North Carolina to treat as final and conclusive an order of a sister state ordering custody of a minor when the courts of the state making the award can subsequently modify the order or decree."

The law of the State of Georgia permits modification of a custody decree upon a showing of substantial change in conditions. *Holmes v. Holmes*, 211 Ga. 827, 89 S.E.2d 194 (1955). Furthermore, N.C.G.S. 50-13.7 (1967) specifically provides:

> "When an order for custody or support of a minor child has been entered by a court of another state, a court of this state may, upon gaining jurisdiction and upon a showing of

> changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support."

Both the decision of the North Carolina Supreme Court and that of the North Carolina Court of Appeals, in the case at bar, plainly stated that North Carolina courts will give full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause, as long as the circumstances attending its rendition remain unchanged. Both courts in fact extended full faith and credit to the 1969 Georgia decree relied on by the petitioners. The basis for the decision awarding custody to Susan Spence was not the denial of full faith and credit, but the express finding of substantial change in circumstances occurring since the entry of the Georgia order. The petitioners clearly have not been deprived of any constitutional rights and privileges as a result of the North Carolina proceedings, which afforded full faith and credit to the Georgia order on which they relied. Indeed, the petitioners strongly contended in the North Carolina Supreme Court, in their motion to dismiss the appeal of Mrs. Spence, that this case involves no substantial constitutional questions. Now they contend to the contrary.

The appellate courts of North Carolina properly limited the issues in this case to the question of whether or not the evidence supported the trial court's findings that a substantial change in circumstances had occurred since entry of the Georgia decree. The exhaustive review of the evidence by the North Carolina Supreme Court demonstrates that the trial judge correctly modified the Georgia decree on the basis of the changed conditions since 1969.

The Supreme Court of the United States has specifically held that where the court of one state is empowered

to alter its own custody decree upon a showing of a change in circumstances affecting the question, the courts of another state may also modify it upon the same grounds. *Ford v. Ford*, 371 U.S. 18, 835 S.Ct. 273, 9 L.Ed. 240 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958); *Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947). Since the Georgia Court could alter its decree upon a showing of a change in circumstances adversely affecting the children no question of the right of the North Carolina court to do so can arise.

It is respectfully submitted that the ruling of the North Carolina Supreme Court is correct and does not warrant review by this Court. The trial judge diligently and responsibly performed his duty, as that duty is delineated by Justice Frankfurter in his dissent to *Kovacs v. Brewer*, 356 U.S. 604, 614, 78 Sup. Ct. 963, 968 (1958):

> "Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively provable. To say this is not to say

that a court should pay no attention to a prior decree or to the STATUS QUO established by it. These are, of course, among the relevant and even important circumstances that a court should consider when exercising a judgment on what the welfare of a child before it requires."

CONCLUSION

The respondent, Susan Durham Spence, sincerely believes that the North Carolina Supreme Court properly upheld the findings of the trial judge awarding her custody of her two minor children, upon the grounds of a substantial change in circumstances occurring since the entry of the 1969 Georgia decree. The petitioners have clearly failed to show the existence of a constitutional issue necessary to the resolution of this case. They should not now be heard to complain, when they have previously asserted the lack of any substantial constitutional issue in this case. The petition for Writ of Certiorari should be denied, to the end that the Order of the District Court of Forsyth County, North Carolina, may be duly enforced.

Respectfully submitted,

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